SUPREME COURT U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [illegible]

ABBOTT ESTRIN, individually and as President of Abbott Exterminating Company and Abbott Exterminating Company, a corporation,

Appellant

v.

W. F. MOSS, Commissioner of Agriculture of Tennessee; H. L. BRUER, Director, Division of Plant Industries in the Tennessee Department of Agriculture; and GEORGE F. McCANLESS, Attorney General of Tennessee

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

STATEMENT AS TO JURISDICTION

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INDEX

	Page
STATEMENT AS TO JURISDICTION	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	10
The Classification Is Arbitrary and Unreasonable	10
Inequality of Application	13
The Appellee's Procedure Violates Due Process *ab Initio*	14
PROOF OF SERVICE	17

APPENDIX

A. Tennessee Supreme Court Opinion	a-1
B. Decree of Chancellor	g-1
C. Chapter VI of Title 43 of the Tennessee Code	c-1
D. Regulations Governing Pest Control Operators of the Tennessee Agriculture Commission	d-1
E. Affidavit of L. A. Meis	e-1
F. Affidavit of Herbert R. Rich, Esq.	f-1

AUTHORITIES CITED

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 533 (1959)	11
Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1930)	2
Corn v. Fort, 170 Tenn. 377, 95 S.W. 2d 620 (1936)	12
F. C. Ryster Guano Co. v. Virginia, 253 U.S. 412 (1920)	11
Logan's Supermarkets v. Atkins, 202 Tenn. 438, 304 S.W. 2d 628 (1957)	12
Ohio, Inc. v. Bowers, 358 U.S. 533 (1959)	11

	Page
Palmer Park Theater Co. v. City of Highland Park, 362 Mich. 326, 106 N.W. 2d 845 (1961)	13
People ex rel. Holland Coal Corp. v. Issaacs, 22 Ill.2d 477, 176 N.E. 2d 889 (1961)	14
Rebsamen Motor Co. v. Phillips, 226 Ark. 146; 289 S.W. 2d 170 (1956)	13
Segal v. Simpson, 121 So. 2d 790 (1960)	13
Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 20 (1938)	2
Weston v. City Council of Charleston, 27 U.S. 449 (1829)	2
Winters v. New York, 333 U.S. 507 (1948)	2

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The Appellant, pursuant to Rules 13(2) and 15 of the United States Supreme Court, files this statement of the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Tennessee in denying Appellant's Petition for an Injunction and why the Court should exercise such jurisdiction in this case.

OPINION BELOW

The Opinion of the Supreme Court of the State of Tennessee denying rehearing in this proceeding was entered on July 25, 1968. This Opinion is not reported. The Opinion of the Supreme Court of Tennessee denying Appellant's appeal from the judgment of the Chancery Court of Davidson County, Tennessee, was issued on June 26, 1968. It is reported at 430 S.W.2d 345. The opinion of the Chancellor of Davidson County was entered on July 6, 1967. This Opinion is not reported.

JURISDICTION

This appeal is from a final judgment entered by the Supreme Court of the State of Tennessee, dismissing Appellant's Petition which prayed for a preliminary and permanent injunction against the enforcement of Chapter VI of Title 43 of the Tennessee Code. Because of the length of this statute, it is set forth as Appendix c, *infra* (App. c-1). It is reported in Tennessee Code annotated, Vol. 8, Page 83, officially cited as 43-609 T.C.A. *et seq.* Appellant's Petition before the Supreme Court of the State of Tennessee alleged that the above-referenced statute as a matter of law and as administered denied him both due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The action was dismissed by final order, denying the Petition for rehearing dated July 25, 1968. Notice of appeal was filed on August 20, 1968.

This Court has jurisdiction on direct appeal to review said judgment below under 28 U.S.C. 1257(2) and the following decisions sustain that jurisdiction: *Winters v. New York*, 333 U.S. 507 (1948); *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931); *Weston v. City Council of Charleston*, 27 U.S. 448 (1829).

QUESTIONS PRESENTED

1. Can the state establish tax classifications, the reasonableness of which classifications cannot be reviewed or set aside by an appellate Court on the grounds that the legislation's judgment constitutes a "question of public policy" which are "considerations solely for the legislature"?

2. Can the state establish a tax which results in marked inequality of application so long as it applies uniformly to a general class?

3. Does a state agent have unlimited discretionary power to revoke a business license if that power is only one of the powers granted to him by statute?

STATEMENT OF THE CASE

The instant proceeding is an appeal from a decision of the Supreme Court of the State of Tennessee denying Appellant's Petition for a permanent injunction against the enforcement of certain provisions of Chapter VI of Title 43 of the Tennessee Code (Insect Pests, Rodents, and Plant Disease Control and Eradication), on the grounds that it violates the Fourteenth Amendment to the Constitution of the United States. This chapter of the Tennessee Code establishes the authority of the Appellee to license and regulate pest control operators such as Appellant, Abbott Estrin. Both Mr. Estrin and his wholly owned Abbott Exterminating Company operate under authority of a pest control license issued by Appellee, which license is the subject of a revocation proceeding by Appellee for the failure of Appellant to pay certain fees called for in the statute. Appellant has contended these fees are unconstitutional as they apply to only one sub-category of the ten licensed classes of pest control operators.

Appellant's qualification as an exterminator is not in issue in this proceeding. Since notice of revocation was served on Appellant by Appellee, Mr. Estrin has received two license renewals during the stay issued against Appellee and has been employed by the federal government, the

State of Tennessee, the City of Nashville, and Davidson County. The sole issue before the Supreme Court was whether the statute under which Appellee sought to revoke Appellant's license to do business denied Appellant the right of Equal Protection guaranteed to him by both the Constitutions of the United States and the State of Tennessee, and whether the Appellee denied to Appellant the right of due process of law.

Chapter VI of Title 43 of the Tennessee Code[1] establishes regulatory control over pest control operators by the State Agricultural Commissioner, Appellee. Section 43-613 of the Tennessee Code requires that each exterminator pay a special fee for termite control jobs. While termite control is not one of the ten categories of licensed qualifications enumerated in the statute, termite extermination is treated differently than other pest control jobs. In addition to the monthly reports of all pest control jobs performed by an exterminator for which no fee is required, any exterminator who performs termite control jobs must file with Appellee a copy of each contract and a three dollar fee per contract. No other special requirement is imposed by the statute to distinguish termite extermination from that of any other pest. The regulations of the Agriculture Commissioner set forth requirements (App. d-1) for termite control not specified in the statute, but the dangers to the public in termite control are far less than that in other forms of pest control for which no fee is required with the monthly report. (Affidavit of L. A. Meis, App. e-1) Similar regulations exist for extermination using highly poisonous gas for which no reporting fee is required. While Section 10 of Section VI of the regulations (App. d-1) permits Appellee to inspect termite extermination jobs "at such times as he may deem desirable". Section 9 permits Appellee to inspect all pest control jobs "from time to time . . . as seems best to the Department". Thus, the

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[1] Hereinafter cited as 43-610 Tennessee Code, *et seq.*

record shows nothing in the statute or regulations of Appellee which makes termite extermination more dangerous to the public than other forms of pest control and, in fact, it is less so. Nothing in the statute requires Appellee to perform more inspections on termite control work than other forms of pest control and, in fact, Appellee's agents do not do so. Thus, the cost of inspecting termite control jobs is not by statute, regulation, or fact any greater than the cost of inspecting other pest control jobs, but only termite extermination jobs are burdened with a fee to pay part of Appellee's total overhead. Section 43-618 places all funds collected (licenses, termite contract fees, etc.) into the treasury for use by Appellee.

Under Section 43-610 of the Tennessee Code (App. C-1), pest control operators may separately qualify for and be licensed to practice in any or all of ten separate enumerated fields.[2] A single license is issued to each operator covering his qualifications in any or all of these fields. The statute does not specify termite control as a separate licensed qualification, as it apparently falls under the general statutory category of "structural pest control, household pest control".

The statute permits a single termite extermination contract to be executed for an entire housing development or a single dwelling, so that smaller operators working on homes pay a substantially larger percentage of their gross income for fees than do the large operators who secure major contracts, such as government installations.

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[2] "Consulting entomology, general; consulting plant pathology, general; structural pest control, household pest control; storage, warehouse, and transportation pest control; fumigation; agricultural pest and disease control, general; agricultural pest and disease control, aircraft application; control of insects affecting men and animals; horticultural spraying; and rodent control." These classifications are briefly discussed in the affidavit of L. A. Meis (App. e-1), relying on standard sources on pest control to illuminate the nature of the treatment used by pest control operators in each class.

Although licensed in several fields, Mr. Estrin does perform termite control jobs. Under the terms of the statute, Mr. Estrin was required to pay the three dollar filing fee for each contract. Section 43-613 of the Tennessee Code further provides that:

> "If any licensed pest control operator shall fail, neglect, or refuse to file the monthly report required above, by or before the specified date, such operator shall be required to pay a penalty of $5.00 and an additional penalty for contracts that are not filed by the specified date in the amount of 10% of the operation fee required by this section for such contracts."

In January of 1967 and again in February, Appellant received a document from the Appellee entitled "Notice of Intent to Revoke License". The provisions of Section 43-614 of the Tennessee Code provide for suspension of a pest control operator's license "(3) If the license holder shall fail to make the registrations and/or reports required in Section 43-611 and 43-613 or shall fail to pay the fees required herein."[3] The act further provides that: "Any license may be revoked by the Commissioner of Agriculture for any of the above reasons when violations are willful or persistent or for any serious or flagrant violation of the requirements of this act or regulations promulgated thereunder." There had been no previous charge of failure to pay the fee. The first notice the Appellant received from the State was an order analogous to one to show cause why his license to do business should not be revoked. The order itself stated that Appellee charges "that the aforesaid violations constitute willful, persistent, serious, and flagrant violations of the requirements of Chapter VI of Title 43 of the Tennessee Code . . . and that the aforesaid violations are sufficient for revocation of the aforesaid license No. 1790."

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[3]Section 43-617 of the Tennessee Code makes any violation of the pest control statute a criminal misdemeanor.

Upon receipt of the "Notice of Revocation", Appellant attempted to pay the fees and fines prescribed by the statute and take the matter of the statute's validity to the Courts, but as shown by the Affidavit of Herbert L. Rich, Esq. (App. f-1), Appellant was informed by Appellee's agents that only surrender of Appellant's license was acceptable to Appellee.

Appellant sought a preliminary and permanent injunction against Appellee from enforcement of Section 43-617 of the Tennessee Code (Revocation of License). The Chancery Court of Davidson County, in a brief decision, concluded "that Tennessee Code Annotated Sections 43-609 through 43-618 do not violate the Constitutions of the United States and the State of Tennessee. . . ." Appeal from the decision of the Chancery Court was taken to the Supreme Court of Tennessee.

The Supreme Court of Tennessee, in considering Appellant's assertion that the fee provisions for termite exterminating jobs of the Tennessee Code (Section 43-613) violated the equal protection provisions of the Constitution of the United States, held:

> "[W]e do not think it arbitrary or unreasonable to place the business of termite extermination into a single class for the purpose of regulation. No licensed pest control operator has been singled out or discriminated against. All persons, or other entities, engaged in the business of termite extermination must follow the same regulations.
>
> Complainant insists no reason is given in the body of the statute for classifying the business of termite extermination in Section 43-613, and urges that this failure to give a reason renders it unconstitutional. We see no merit in this argument.
>
> The question of whether the business of termite eradication should be regulated to the extent indicated by this Section is a question of public policy, public policy being the present concept of the public welfare or general good . . . . This Court has

> nothing to do with questions of policy . . . . These are considerations solely for the Legislature . . . .
>
> We are of the opinion it is unnecessary the legislature spell out in the body of a particular Act its reasons for adopting one particular policy or another. 'The Courts cannot require the legislature to specify its reasons for a classification.'"

The Court avoided meeting Appellant's assertion that the sub-category of termite control operators for the purpose of taxation was unreasonable and arbitrary. The Court noted that termite operators use dangerous poisons near homes in a manner prescribed by specific Agriculture Department regulations (App. d-1). The Court overlooked the point that the other untaxed classes of exterminators use even more dangerous poisons in or near homes pursuant to other specific Agriculture Department Regulations as fumigators, and no tax is imposed on this class of pest control operators.

In regard to the unreasonableness of the inequality of the fee imposed per contract, the Court stated:

> "Complainant also argues that Section 43-613 unjustly discriminates against the smaller businesses engaged in termite extermination since it requires a fee of $3.00 for each contract regardless of the size of the contract, whether the contract covers a single house or a large commercial complex, Complainant insists this requirement results in inequality.
>
> A classification is not unconstitutional merely because in practice it results in some inequality, where the classification has a reasonable basis.
>
> So long as the regulation applies equally and consistently to all persons in the same class under similar facts and circumstances, the inequality or differential in the total amount of fees paid is not unconstitutional."

Here the Court again assumed, but made no effort to find a reasonable basis outside the statute to support the inequalities resulting from the tax classification imposed by

the statute by contract rather than by size of the job.

Finally, in reviewing Appellant's assertion that the procedures invoked by Appellee were tantamount to prejudgment that Appellant's license should be revoked, the Court ruled:

> "Complainant argues four basic reasons for finding the Section in violation of due process: No hearing is required for the suspension of a license; any person who receives notice of suspension or revocation of his license must apply in writing to the Commissioner in order to obtain a hearing; the burden of proof is placed on the recipient of a notice of intention to revoke license; and that the Commissioner before whom the hearing must be held acts as both judge and prosecutor, thus he is not fair and impartial as required by due process."

* * *

The Court ignored the fact that Appellant had never previously been charged with any violations of the Code, or that Appellee had not considered whether the less stringent remedy of penalties provided by the statute might in justice be employed. Appellee's refusal to consider tender of the fees and penalties under protest and the Appellee's unswerving determination to revoke Appellant's license so tainted the due process rights of Appellant as to deny him the fundamental right of a fair forum.

From January, 1967 to the present, the proceeding to revoke Appellant's license before the State Agricultural Commissioner was stayed by the Court with the gracious consent of the Assistant Attorney General of the State of Tennessee. This stay has been extended by the Supreme Court of Tennessee pending the decision of this Court. In the interim, the Appellant's license has been renewed yearly and no question of Appellant's basic qualifications had been raised. On August 20, 1968, Notice of Appeal to the Supreme Court of the United States was filed. After this, on September 3, 1968, new notices to revoke Appellant's current license to do business were served on Appellant by Appellee.

QUESTIONS PRESENTED ARE SUBSTANTIAL

The Classification is Arbitrary and Unreasonable

The issues involved in this Appeal seek to clarify the power of a state to establish sub-classes of a regulated industry for the purposes of taxation, which tax excludes the remaining regulated classes. Appellant has contended before the Supreme Court of the State of Tennessee that Tennessee's regulatory scheme over pest control operators, as a general class, denies to those pest control operators doing termite control, as Appellant, the protection provided by the Equal Protection provision of the Fourteenth Amendment of the Constitution of the United States. The Tennessee Supreme Court in rejecting this assertion concluded that it is:

> "Neither arbitrary nor unreasonable to place the business of termite extermination into a single class for purposes of regulation. No licensed pest control operator has been singled out or discriminated against. All persons, or other entities, engaged in the business of termite extermination must follow the same regulations."

The Court did not consider whether the Tennessee Legislature acted reasonably in establishing termite control as a separate group required to pay a fee for each job, as opposed to other forms of pest control. The Court never considered the question of reasonableness of the statute as "this Court has nothing to do with questions of policy". It is respectfully submitted that whenever the protections of the Fourteenth Amendment are so raised, the State's Courts have a positive duty to see whether the classification imposed by the legislature is palpably arbitrary or unreasonable.

The rule is well settled that the tax classes among groups established by a state must rest upon some ground or difference having a fair and substantial relation to the object of the legislation. If the classification is found on a reasonable distinguishable difference in state policy, it is

not arbitrary, *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959). This policy may be found in the language of the statute, its history, or in reasonable interpretation, but the fact that it is state policy to classify in a certain manner is not justification in itself. While, admittedly, the state has a wide discretion in taxation, the Supreme Court of Tennessee extended this concept of wide discretion to give *carte blanche* to the Tennessee legislature to impose whatever tax it desires upon any group or class so long as it doesn't apply it to individuals. The Court overlooks the fact that the language of the statute or its history gives no guidelines and does not satisfy the protections of the Fourteenth Amendment which requires the Court to go a step further and examine if, in fact, the legislative scheme of classification is arbitrary, unreasonable or illusory. *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

It is clear that all pest control operators use poisons dangerous to man, plants, and animals (App. e-1). For this reason, the state has established a requirement that the State Agricultural Commission license and regulate all classes of pest control operators (43-610 T.C.). The statute further provides for license revocation or suspension for those pest control operators who breach the State Agricultural Commission's regulations. The classification of termite control is not enumerated in the statute's licensing classification (43-610 T.C.). It is solely set forth in the provision (43-613 T.C.) requiring all pest control operators to file monthly reports and imposing the additional requirement that termite jobs be performed under separate contract copies of which are filed with a three dollar fee.

All pest control operators pay a basic license fee, which fees go into the general fund of the State Agricultural Commission. This fund underwrites, among other things, part of the cost of providing inspectors for pest control jobs. While all pest control operators are subject to inspection, only termite control operators pay a fee for each contract they perform. The poisons and procedures used by operators performing termite control, as shown in App. e-1 (Affi-

davit of L. A. Meis) are, in fact, less dangerous to man, plants and animals than the other licensed categories of pest control. There is no reason or provision in either the statute or regulation for operators performing termite control to receive more state inspection than other pest control operators and, in fact, they do not receive any more frequent or detailed inspection than any other form of pest control operator. There is no apparent distinction in the record between termite control and other forms of non-taxed structural pest control other than the fact that the former exterminate termites rather than rats, mice, roaches or other structural vermin or pests as fungi, although he may do both jobs at the same time.

The Tennessee State Supreme Court, in prior opinions, has noted that the Tennessee Constitution, as well as the Fourteenth Amendment of the Constitution of the United States, precludes the unreasonable establishment of artificial tax categories. In *Corn v. Fort*, 170 Tenn. 377, 95 S.W.2d 620 (1936), the Court held that there was no valid distinction between a partnership and individual performing the same job and so set aside a tax imposed on partnerships and corporations, but excluding individuals.

So, too, in *Logan's Supermarkets v. Atkins*, 202 Tenn. 438, 304 S.W.2d 628 (1957), the Tennessee Supreme Court held that tax on merchants using trading stamp companies, while exempting those giving or redeeming their own stamps or hiring others to redeem company-owned stamps, was an arbitrary, capricious and unreasonable classification in violation of the state and federal constitutions because there was no real or substantial difference. In neither case did the Court conclude that these classifications were sufficient as state "policy". Certainly a Court that can determine the lack of justification for the legislature to tax partnerships but not individuals doing the same job can review the reasonableness of a tax on termite control but not on fumigation of the same structure.

State Courts have uniformly held that there must be something in the one mode of doing business which makes it unique to justify classification for tax purposes over another mode of the same business, *Rebsamen Motor Co. v. Phillips*, 226 Ark. 146, 289 S.W.2d 170 (1956) (automobile franchised dealers taxed, unfranchised dealers exempted); *Segal v. Simpson*, 121 So. 2d 790 (1960) (taxes on bottle clubs with live entertainment, exempting those with non-live entertainment); *Palmer Park Theatre Co. v. City of Highland Park*, 362 Mich. 326, 106 N.W.2d 845 (1961) (tax on water-cooled air conditioners of five tons or more, exempting units under five tons where it was shown that they both use the same amount of water, ton for ton).

The State of Tennessee in the instant proceeding has raised a novel precedent that a state can be unreasonable in establishing tax classifications so long as it is uniformly unreasonable and applies the tax to all persons bearing the same title. In the absence of any justification in the language of the statute or reasonable interpretation of the legislative rationale for imposing a fee on termite control not imposed on fumigation, crop dusting, or other forms of pest control, the Court should have struck down the statute as contravening the Equal Protection provisions of the Fourteenth Amendment.

Inequality of Application

The statute in question raises a further substantial federal question as to the taxing criteria of permitting large contracts, such as housing developments, county or state contracts to be reported with a single filing fee of $3.00 by major exterminating operators, as opposed to the small individual operators who must report each home under a separate contract and pay a substantial portion of their charges in tax. The Court deems that such classifications are not unconstitutional merely because in practice it results in inequality if the classification has a reasonable basis. The Court then aborts its duty to go further and look into the

question of whether, in fact, the classification has a basis in reason. By the classification, a large operator has a proportionately greater percentage of profits per job than the small operator and pays substantially less proportionately to the state for the cost of periodically inspecting the large jobs than does the small operator toward the periodic inspection of his small jobs. Since neither the statute nor its legislative history specifies how the $3.00 per contract fee is to be used, it must be assumed that it is in some way related to underwriting the inspections of termite extermination jobs. Obviously, the larger the job the greater the time and cost of inspection. For this reason, the Court's failure to determine the reasonableness of the inequities of the classification as requested by Appellant is tantamount to failure of the Court to provide to the Appellant and other small operators the equal protection and due process rights of the Fourteenth Amendment. *People v. Issaacs*, 22,Ill.2d 477, 176 N.E.2d 889 (1961).

The Appellee's Procedure Violates Due Process Ab Initio

Section 43-613 of the Tennessee Code provides for penalty of $5.00 and additional penalties of 10% on all termite exterminating contracts which are not reported to the state. Where the operator has failed to make such reports or pay the fees, Section 43-614 empowers the State Agricultural Commissioner to suspend the license of the operator after hearing "until the violations or circumstances causing such suspension have been corrected or removed to the satisfaction of the Commissioner of Agriculture". Further, the Commissioner, when finding such violations are "willful or persistent or for any serious or flagrant violation of the requirement of this act or regulations" may revoke the license. The Appellee did not seek to suspend Appellant's license or collect fees and fines, but *ab initio* sought to revoke his license thereby indicating Appellee's predetermination that the failure of Appellant to file monthly termite

contracts and pay the fees was a violation which was "willful," "persistent," "serious" and "flagrant".

The pest control legislation herein not only establishes the Agricultural Commissioner as a person who serves the notice of violation, but also appoints the judge, and holds the right of review. It would, therefore, appear from the face of the notice that the Appellee *ab initio* determined that Appellant was a serious and willful violator of the state Code. The Appellee refused to accept tender of the fees and fines as prescribed by the Code or to consider any other procedure except revocation of license (App. f-1). It would, therefore, appear the Appelleee prejudged the case of Mr. Estrin to the point that the only result of the proceeding would or could be revocation of license. Such a prejudgment of the facts and the discretionary relief to be applied by the Agricultural Commissioner removes the barest pretense of the state's giving to the Appellant any rights of due process of law and in its place substitute a kangaroo court determined to put the Appellant out of business. To give such power to the Appellee makes him judge, jury and executioner without the tempering mercy of judicial review. The Tennessee Supreme Court has rejected this contention, holding that it can only presume that the act will be administered in full compliance with the State and Federal Constitutions. Such compliance requires the fundamental right of due process and due process is foreclosed when the expressed position of the agency administrator from the first moment of the case is one of immediate termination of Appellant's business without consideration of the other forms of relief or tender of the fees and fines prescribed by the statute. This absolute power of the Appellee is particularly oppressive when it is remembered that this procedure enables him to additionally charge the Appellant with a criminal misdemeanor where his discretion sees fit. Mere judicial review by the Tennessee Supreme Court of whether Appellee acted within his statutory power does not overcome the effect of this prejudgment. In a criminal proceeding, such prejudgment would be grounds for immediate reversal. The fact

that the state is here dealing with the execution of a man's business rather than his person may temper the attitude of the Court, but should have required it no less to protect Appellant's right of fundamental due process.

Due process requires the Appellee to treat Appellant with the proper attitude, as well as proper process. Since it was obviously the legislative scheme to permit a fine for failure to file these termite contracts and to permit the suspension of the license for a period of time until these fees and penalties are paid, unless the violations were "willful", "persistent", "serious", or "flagrant", the use of the extreme procedure of revocation *ab initio* is indicative of such predisposition on the part of the Appellee that the Appellant was denied due process *per se*.

It must be remembered that the sole question of the Appellant's qualifications to do business was related to his failing to file the termite contracts and pay fees. No question of Appellant's qualifications as an exterminator has ever been raised by the state. In fact, for two years subsequent to the notice of revocation, new licenses have been issued to the Appellant. Therefore, the Appellee has taken the power upon himself to revoke Appellant's license solely because of the license fee or taxing statute provision and despite Appellant's offer to fully comply with all terms of the statute regarding fees and penalties. It is respectfully submitted that such untempered power deprives the Appellant of due process in every sense of the term.

We believe the questions presented by this Appeal are substantial, that they are of public importance, and should be considered by this Court.

Respectfully submitted,

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Attorney for Appellant

PROOF OF SERVICE

I, Robert W. Healy, attorney for Appellant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1968, I served a copy of the foregoing statement as to jurisdiction on the several parties hereto by mailing said copies in a duly addressed envelope with first-class postage prepaid to their attorneys of record, Paul E. Jennings, Esquire, Assistant Attorney General, State of Tennessee, Supreme Court Building, Nashville, Tennessee, 37219.

Washington, D.C., this ___ day of October, 1968.

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